REMARKS

Claims 1-30, 32-35 and 43-45 are pending in the instant application. Of these, claims 16-30, 32, 34 and 35 have been withdrawn previously by the Examiner. Accordingly, claims 1-15, 33, and 43-45 are pending and under examination.

February 28, 2003 Final Office Action

Withdrawal of Previous rejections

In the February 28, 2003 Final Office Action, the Examiner withdrew the 35 U.S.C. 102(b) rejection of the claims over AT 393505, based on Applicants' previous amendments.

Applicants acknowledge and appreciate the withdrawal of this rejection.

Examiner's rejection under 35 U.S.C. §103

In the Final Office Action, the Examiner rejected claims 1-15, 33, and 43-45 under 35 U.S.C. §103(a) as allegedly being unpatentable over AT 393505 and Eibl, et al. (EP 534,445), each taken alone. The Examiner stated that the Applicants claim phosphates and phosphoamines. The Examiner then asserted that the AT 39305 reference teaches "phosphates and phosphoamines which are structurally similar to the instant claimed compounds." The Examiner further stated that EIBL et al "also teach phosphate esters which are structurally similar to the instant claimed compounds," concluding that the difference between some of the compounds of the prior art and the claimed compounds "is that of generic description."

The Examiner moreover stated that "the indiscriminate selection of 'some' from 'many' is

prima facie obvious" and asserted that the motivation to make the claimed compounds derives from the expectation that structurally similar compounds would possess similar cytotoxic activity. The Examiner then concluded that on this basis, one skilled in the art would be motivated to prepare compounds embraced by the prior art to arrive at the instant claimed compounds with the expectation of obtaining additional beneficial compounds which would have cytotoxic activity and be used to treat tumors. The Examiner concluded that the instantly claimed compounds would therefore have been suggested to one skilled in the art.

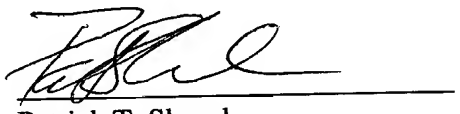
In response, Applicants respectfully traverse the Examiner's rejection. At the outset, Applicants disagree with the Examiner's statement that "the indiscriminate selection of 'some' from 'many' is *prima facie* obvious." Indiscriminate or random selection of some or a few compounds from a large group clearly is not a *prima facie* case of obviousness. The very meaning of "indiscriminate selection" is inconsistent with a motivation to select specific compounds as required for a showing of obviousness in a case such as the instant one. The Examiner's position appears therefore to be that one of ordinary skill in the art would have simply selected a few compounds from the vast number of compounds generically described in the prior art without any motivation behind the selection (i.e. a random or "indiscriminate" selection), then modified these selected compounds to arrive at the Applicants' specific, claimed compounds with the expectation that these finally chosen compounds would yield success. Applicants assert that such indiscriminate selection followed by chance arrival at the claimed invention, clearly does not represent a *prima facie* case of obviousness.

Applicants assert that at best, the Examiner is applying an impermissible "obvious to try" rationale. (See MPEP §2145). For one of skill in the art to select the Applicants' claimed

compounds based on the prior art teachings, the artisan would need to try all of the numerous possible choices and vary all parameters until one possibly arrived at a successful result. This approach would need to be undertaken without any indication in the art as to what substitutions would be critical or which of the vast number of possible choices would ultimately be successful. Applicants respectfully remind the Examiner that an "obviousness to try" is not sufficient to support an obviousness rejection under 35 U.S.C. §103. Accordingly, Applicants assert that the rejected claims are not obvious in light of the cited prior art and thus respectfully request that the Examiner reconsider and withdraw the rejection of claims 1-15, 33, and 43-45 under 35 U.S.C. §103(a).

In light of the above remarks, Applicants believe that the Examiner's rejections set forth in the February 28, 2003 Final Office Action have been fully overcome and that the present claims fully satisfy the patent statutes. Applicants therefore believe that the application is now in condition for allowance. The Examiner is invited to telephone the undersigned if it is deemed to expedite allowance of the application.

Respectfully submitted,



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